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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matters of	)	
	)	
Deployment of Wireline Services Offering Advanced Telecommunications Capability	)	CC Docket No. 98-147
	)	
Petition of Bell Atlantic Corporation For Relief from Barriers to Deployment of Advanced Telecommunications Services	)	CC Docket No. 98-11
	)	
Petition of U S WEST Communications, Inc. For Relief from Barriers to Deployment of Advanced Telecommunications Services	)	CC Docket No. 98-26
	)	
Petition of Ameritech Corporation to Remove Barriers to Investment in Advanced Telecommunications Technology	)	CC Docket No. 98-32
	)	
Petition of the Alliance for Public Technology Requesting Issuance of Notice of Inquiry and Notice of Proposed Rulemaking to Implement Section 706 of the 1996 Telecommunications Act	)	CCB/CPD No. 98-15 RM 9244
	)	
Petition of the Association for Local Telecommunications Services (ALTS) for a Declaratory Ruling Establishing Conditions Necessary to Promote Deployment of Advanced Telecommunications Capability Under Section 706 of the Telecommunications Act of 1996	)	CC Docket No. 98-78
	)	
Southwestern Bell Telephone Company, Pacific Bell, and Nevada Bell Petition for Relief from Regulation Pursuant to Section 706 of the Telecommunications Act of 1996 and 47 U.S.C. § 160 for ADSL Infrastructure and Service	)	CC Docket No. 98-91
	)	

MEMORANDUM OPINION AND ORDER, AND NOTICE OF PROPOSED RULEMAKING

Adopted: August 6, 1998 **Released: August 7, 1998**

Comment Date: **September 21, 1998**
Reply Comment Date: **October 13, 1998**

By the Commission: Commissioners Ness, Powell and Tristani issuing separate statements.

TABLE OF CONTENTS

telecommunications carriers.[349] We further conclude above that, to the extent advanced services are telephone exchange services, incumbent LECs must offer such services for resale.

188. We now seek comment on the applicability of section 251(c)(4) to advanced services to the extent that such services are exchange access services. We tentatively conclude that such advanced services are fundamentally different from the exchange access services that the Commission referenced in the *Local Competition Order* and concluded were not subject to section 251(c)(4). We expect that advanced services will be offered predominantly to ordinary residential or business users or to Internet service providers. None of these purchasers are telecommunications carriers.[350]

189. By its terms, section 251(c)(4) applies to "any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." Advanced services generally offered by incumbent LECs to subscribers who are not telecommunications carriers meet this statutory test.[351] We thus tentatively conclude that these services fall within the core category of retail services that both Congress and the Commission deemed subject to the resale obligation, and the reasoning that led the Commission in the *Local Competition Order* to exclude exchange access from the section 251(c)(4) resale obligation does not apply. We tentatively conclude, therefore, that advanced services marketed by incumbent LECs generally to residential or business users or to Internet service providers should be deemed subject to the section 251(c)(4) resale obligation, without regard to their classification as telephone exchange service or exchange access.[352] We seek comment on these tentative conclusions.

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[349] *See supra* ¶ 30.

[350] *See Report to Congress on Universal Service* at ¶¶ 73-82 (Internet service providers are not telecommunications carriers).

[351] As noted above, advanced services are telecommunications services. *See supra* ¶¶ 35-36.

[352] 47 U.S.C. § 251(c)(4). To the extent that specific advanced services are marketed primarily to telecommunications carriers, however, they would remain outside the scope of the resale obligation.

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Intermedia Communications Inc.
CC Docket No. 98-147
September 25, 1998

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
Deployment of Wireline Services Offering	)	
Advanced Telecommunications Capability	)	CC Docket No. 98-147

INITIAL COMMENTS OF INTERMEDIA COMMUNICATIONS INC.

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September 25, 1998

VI. THE COMMISSION IS CORRECT IN CONCLUDING THAT ADVANCED SERVICES SOLD TO END USERS MUST BE MADE AVAILABLE FOR RESALE PURSUANT TO § 251(c)(4)

Intermedia strongly supports the Commission's tentative conclusion that advanced services provided to end users are subject to resale just like any other telecommunications service.[99] The plain language of the Act states that the ILECs' § 251(c)(4) resale obligation extends to "any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers." Thus, the Commission's tentative conclusion clearly comports with the Act.

The Commission should similarly extend ILEC resale obligations to access services that are purchased by end users. Intermedia understands that the Commission up to this point has not required ILECs to resell exchange access services because the "vast majority" of purchasers of interstate access service are telecommunications providers, who are not permitted to purchase for their own use ILEC wholesale services.[100] However, the Commission did note that "end users do occasionally purchase some access services,"[101] and for these end users, the Commission should permit competitive carriers to resell exchange access services at the wholesale rates prescribed by state regulators. Any other result would violate the plain terms of the Act, which requires ILECs to resell all telecommunications services offered to end users.

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99 *NPRM* at ¶¶ 188-89.

100 *Local Competition Order*, 11 FCC Rcd at 15934, ¶ 873.

101 *Local Competition Order*, 11 FCC Rcd at 15934, ¶ 873.

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CODE OF FEDERAL REGULATIONS
TITLE 47--TELECOMMUNICATION
CHAPTER I--FEDERAL COMMUNICATIONS COMMISSION
SUBCHAPTER B--COMMON CARRIER SERVICES
PART 51--INTERCONNECTION
SUBPART G--RESALE
Current through June 15, 1999; 64 FR 32106

§ **51.613** Restrictions on resale.

(a) Notwithstanding § 51.605(b), the following types of restrictions on resale may be imposed:

(1) Cross-class selling. A state commission may permit an incumbent LEC to prohibit a requesting telecommunications carrier that purchases at wholesale rates for resale, telecommunications services that the incumbent LEC makes available only to residential customers or to a limited class of residential customers, from offering such services to classes of customers that are not eligible to subscribe to such services from the incumbent LEC.

(2) Short term promotions. An incumbent LEC shall apply the wholesale discount to the ordinary rate for a retail service rather than a special promotional rate only if:

(i) Such promotions involve rates that will be in effect for no more than 90 days; and

(ii) The incumbent LEC does not use such promotional offerings to evade the wholesale rate obligation, for example by making available a sequential series of 90-day promotional rates.

(b) With respect to any restrictions on resale not permitted under paragraph (a), an incumbent LEC may impose a restriction only if it proves to the state commission that the restriction is reasonable and nondiscriminatory.

(c) Branding. Where operator, call completion, or directory assistance service is part of the service or service package an incumbent LEC offers for resale, failure by an incumbent LEC to comply with reseller unbranding or rebranding requests shall constitute a restriction on resale.

(1) An incumbent LEC may impose such a restriction only if it proves to the state commission that the restriction is reasonable and nondiscriminatory, such as by proving to a state commission that the incumbent LEC lacks the capability to comply with unbranding or rebranding requests.

(2) For purposes of this subpart, unbranding or rebranding shall mean that operator, call completion, or directory assistance services are offered in such a manner that an incumbent LEC's brand name or other identifying information is not identified to subscribers, or that such services are offered in such a manner that identifies to subscribers the requesting carrier's brand name or other identifying information.

<General Materials (GM) - References, Annotations, or Tables>

47 C. F. R. § **51.613**

47 CFR § **51.613**

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Application of BellSouth Corporation, *et al.*	)	CC Docket No. 97-208
Pursuant to Section 271 of the	)	
Communications Act of 1934, as amended,	)	
To Provide In-Region, InterLATA Services	)	
In South Carolina	)	
	)	
	)	

MEMORANDUM OPINION AND ORDER

Adopted: December 24, 1997 **Released: December 24, 1997**

By the Commission: Chairman Kennard and Commissioners Ness, Furchtgott-Roth, and Powell issuing separate statements.

TABLE OF CONTENTS

and term arrangements, special service arrangements, customized telecommunications service agreements, and master service agreements.

213. The Commission's rules on resale restrictions provide that, "[e]xcept as provided in § 51.613 of this part, an incumbent LEC shall not impose restrictions on the resale by a requesting carrier of telecommunications services offered by the incumbent LEC."[625] Rule 51.613 provides in pertinent part that, "[w]ith respect to any restrictions on resale not permitted under paragraph (a), an incumbent LEC may impose a restriction only if it proves to the state commission that the restriction is reasonable and nondiscriminatory."[626] The Eighth Circuit specifically held that determinations on resale restrictions are within the Commission's jurisdiction and upheld our resale restriction rules as a reasonable interpretation of the 1996 Act's terms.[627]

214. BellSouth states clearly that it will not make CSAs available at a wholesale discount.[628] BellSouth's SGAT provides that "BellSouth's contract service arrangements are available for resale only at the same rates, terms and conditions offered to BellSouth end users."[629]

2. Discussion

215. We find that BellSouth fails to comply with item fourteen of the competitive checklist by refusing to offer CSAs at a wholesale discount. Moreover, based on evidence presented in the record, we are concerned that BellSouth's failure to offer CSAs for resale at

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[625] 47 C.F.R. § 51.605(b).

[626] *Id.* § 51.613(b). The resale restrictions permitted under subparagraph (a) do not involve CSAs. Those permissible restrictions relate to cross-class selling and short term promotions. *Id.* § 51.613(a)(1), (a)(2).

[627] *Iowa Utils. Bd.*, 120 F.3d at 818-19. The Eighth Circuit held:

> [W]e believe that the FCC has jurisdiction to issue these particular rules and that its determinations are reasonable interpretations of the Act. . . . [S]ubsection 251(c)(4)(B) authorizes the Commission to issue regulations regarding the incumbent LECs' duty not to prohibit, or impose unreasonable limitations on, the resale of telecommunications services. . . . [47 C.F.R. § 51.613] is a valid exercise of the Commission's authority under subsection 251(c)(4)(B) because it restricts the ability of incumbent LECs to circumvent their resale obligations under the Act simply by offering their services to their subscribers at perpetual "promotional" rates.

Id. at 819.

[628] *See* SGAT § XIV(B)(1); *see also* BellSouth Application at 53; *see also* BellSouth Varner Aff. at paras. 191-192.

[629] SGAT § XIV(B)(1).

a discount impedes competition for its large-volume customers and thus impairs the use of resale as a vehicle for competitors to enter BellSouth's market.

216. There is no dispute that, pursuant to the terms of the SGAT, BellSouth refuses to resell CSAs at a discount. Nor is there any dispute that CSAs constitute a retail service. The issue, therefore, is whether BellSouth's refusal to offer this particular retail service at a wholesale rate constitutes a "reasonable and nondiscriminatory" restriction.[630] In this regard, BellSouth states that the SGAT "offers CLECs wholesale rates for any services that BellSouth offers to its retail customers, with the exception of those excluded from resale requirements in accordance with the Commission's rules and the orders of the [South Carolina Commission] . . . includ[ing] . . . contract service arrangements (which are available for resale at the same rates, terms and conditions offered to BellSouth's end user customers)."[631] BellSouth provides no explanation in its Brief in Support of its refusal to offer CSAs at wholesale rates, nor any rationale for considering the refusal reasonable or nondiscriminatory. BellSouth's supporting affidavits note that the South Carolina Commission concluded in the *AT&T Arbitration Order* that "the wholesale discount would not be applied to CSAs."[632] In the *AT&T Arbitration Order*, the South Carolina Commission stated that CSA's "should not receive a further discount below the contract service arrangement rate."[633] The state commission justified this conclusion by arguing that "CSAs are designed to respond to specific competitive challenges on a customer-by-customer basis. As BellSouth argued, the contract price for these services has already been discounted from the tariffed rate in order to meet competition."[634]

217. By offering CSAs only at their original rates, terms and conditions, BellSouth has created a general exemption from the wholesale requirement for CSAs. The *Local Competition Order*, however, made clear that the language of section 251(c)(4) "makes no exception for promotional or discounted offerings, including contract and other customer-specific offerings" and that, therefore, "no basis exists for creating a general exemption from the wholesale requirement for all promotional or discount service offerings made by

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[630] BellSouth's refusal to offer CSAs at a wholesale discount was the subject of a motion to dismiss filed by AT&T and LCI. *AT&T/LCI Motion to Dismiss* at 14. As noted above, we have treated the motion as early filed comments.

[631] BellSouth Application at 53.

[632] BellSouth Varner Aff. at para. 192. We note that BellSouth's failure to articulate in its Brief in Support its justification for the CSA restriction violates the procedural rules the Commission has promulgated to govern section 271 applications. The Commission has directed parties to present substantive arguments in their Brief in Support. Such arguments should not be contained solely in affidavits or supporting documentation. *Sept. 19th Public Notice*; *see also Ameritech Michigan Order* at para. 60 (arguments must be clearly stated in the brief with appropriate references to supporting affidavits).

[633] *AT&T Arbitration Order* at 4.

[634] *Id.* at 4-5.

incumbent LECs."[635] BellSouth's justification for the general exemption is that the South Carolina Commission ruled in the *AT&T Arbitration Order* that the wholesale discount need not be applied to CSAs because they are already discounted. In the Local Competition proceeding, however, incumbent LECs raised the same argument with respect to volume discounts -- that the wholesale rate obligation should not apply to high volume rate offerings because they are already discounted.[636] The Commission specifically considered and rejected this argument in the *Local Competition Order*, concluding that any service sold to end users is a retail service, and thus is subject to the wholesale discount requirement, even if it is already priced at a discount off the price of another retail service.[637] Thus the only justification that BellSouth offered in its application for the SGAT's general exemption for CSAs is one which this Commission has specifically rejected.

218. The Commission's rules require a BOC to prove to the state commission that a resale restriction is reasonable for section 251 purposes.[638] The rule does not contemplate, however, that a state commission can create a general exemption of all CSAs from the Act's requirement that retail offerings be available for resale at a discount from the retail price. Indeed, the *Local Competition Order* specifically found that the Act does not permit a general exemption from the wholesale requirement for promotional or discounted offerings, including CSAs.[639] In adopting section 51.613(b) of the Commission's rules, the Commission explained that 51.613(b) was intended to and grants state commissions the authority only to approve "narrowly-tailored" resale restrictions that an incumbent LEC proves to a state commission are reasonable and nondiscriminatory.[640] To interpret the rule to allow states to create a general exemption from the wholesale requirement for all CSAs would run contrary to the Act. Thus, BellSouth's general restriction on the provision of CSAs at wholesale rates is unlawful.

219. Following BellSouth's application, and AT&T's and LCI's motion to dismiss in part on CSA grounds, the South Carolina Commission, in their comments, and BellSouth in its reply, have provided further justifications for the CSA restriction. BellSouth and the South Carolina Commission contend, for example, that the South Carolina Commission's approval of the CSA exemption is a local pricing matter within the South Carolina Commission's

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[635] *Local Competition Order*, 11 FCC Rcd at 15970.

[636] *Id.* at 15968.

[637] *Id.* at 15971 ("If a service is sold to end users, it is a retail service, even if it is priced as a volume-based discount off the price of another retail service."); *see also AT&T/LCI Motion to Dismiss* at 15 & n.12.

[638] 47 C.F.R. § 51.613(b). The Eighth Circuit held that determinations on resale restrictions are within the Commission's jurisdiction, and that our resale restriction rules are a reasonable interpretation of the terms of the 1996 Act. *Iowa Utils. Bd.*, 120 F.3d at 818-19.

[639] *Local Competition Order*, 11 FCC Rcd at 15966, 15970.

[640] *Id.* at 15966.

intrastate jurisdiction.[641] This contention is erroneous. The Commission's conclusions in the *Local Competition Order* regarding the scope of the resale requirement as it applies to promotions and discounts, including CSAs, was upheld by the Eighth Circuit.[642] In upholding the Commission's determination, the court stated that the Commission's rules requiring the resale of promotions and discounts concern the "overall scope of the incumbent LECs' resale obligation" rather than "the specific methodology for state commissions to use in determining the actual wholesale rates."[643] Additionally, in establishing BellSouth's exemption from offering CSAs to resellers at wholesale rates, the South Carolina Commission analyzed the matter as a resale restriction rather than as a pricing issue.[644] BellSouth's own arguments concerning the resale of CSAs similarly analyze the issue as a resale restriction.[645] Allowing incumbent LECs to set the wholesale discount for services that must be resold at a discount of zero would wholly invalidate such a wholesale pricing obligation. Moreover, there is no evidence in the record that the South Carolina Commission conducted an analysis to determine that the appropriate discount for CSAs should be zero.

220. The South Carolina Commission also contends that its policy with respect to pricing for CSAs is the only reasonable way to implement the Act's resale provisions. The South Carolina Commission states that BellSouth does not bear ordinary marketing costs for CSAs because they are individually negotiated arrangements, and that therefore the 14.8 percent resale discount applicable to BellSouth's generally available retail offerings would greatly overstate the costs avoided by BellSouth. Moreover, the South Carolina Commission contends that it would be impossible to determine on a case-by-case basis what discount is necessary to account for BellSouth's potential cost savings with respect to a particular CSA.[646] We do not believe, however, that such a process would be necessary. Because similar marketing, billing, and other costs would be avoided for all CSAs, we believe that it would be feasible, and sufficiently accurate, to calculate a single discount rate that would apply to all CSAs.[647] A single discount rate based on the costs avoidable through offering CSAs at wholesale could be applied easily and would ensure that BellSouth was made no worse off by the resale of its services. AT&T states that neither BellSouth nor the South Carolina Commission has provided any analysis to show that the 14.8 percent discount rate would

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[641] BellSouth Reply Comments at 60; South Carolina Commission Comments at 11.

[642] *Iowa Utils. Bd.*, 120 F.3d at 819.

[643] *Id.*

[644] *See AT&T Arbitration Order* at 4-5 ("The Act indeed permits reasonable and non-discriminatory conditions or limitations on the resale of telecommunications services, and we therefore condition our ruling with respect to CSAs.").

[645] *See* BellSouth Reply Comments at 60.

[646] South Carolina Commission Comments at 10.

[647] In the *Local Competition Order*, the Commission concluded that the discount rate could vary by service. *Local Competition Order*, 11 FCC Rcd at 15957-58.

overstate the avoided costs of CSAs, and in fact no such analysis appears in the record presented to us.[648]

221. BellSouth also argues in reply that, if it were to be required to offer CSAs to resellers at a wholesale discount, it would lose customers and their contribution to total cost recovery. This, according to BellSouth, would affect its ability to meet the goal of "maximizing access by low-income consumers to telecommunications services."[649] We find unpersuasive BellSouth's claims regarding contribution loss resulting from wholesale-priced resale-based competition. Claims of lost contributions to high-cost subsidies do not justify an exception from either the resale requirements or the requirement to offer unbundled network elements of sections 251 and 271.

222. AT&T and LCI have also raised the issue of cancellation penalties that may apply when a new entrant seeks to resell the CSA contract.[650] They contend that such penalties have the effect of "insulat[ing] substantial portions of the market from resale competition."[651] There is insufficient evidence in the record concerning the exact nature of the cancellation or transfer penalties BellSouth is charging, or seeks to include in its CSAs during negotiations with potential customers, for us to conclude at this time that such fees create an unreasonable condition or limitation on resale of the service. We are sensitive that CSAs represent agreements that provide both the LEC and the CSA customer with various benefits. Because, depending on the nature of these fees, their imposition creates additional costs for a CSA customer that seeks service from a reseller, they may have the effect of insulating portions of the market from competition through resale. We, therefore, would want to review such fees and request that BOCs provide information justifying the level of cancellation or transfer fees in future applications.

223. We conclude by reemphasizing the important policy concerns that make restrictions on resale undesirable. BellSouth's CSA restriction may have significant competitive effects. Resale is one of the three mechanisms Congress developed for entry into the BOCs' monopoly market. BellSouth's restriction on CSAs may have the effect of impeding this entry vehicle. The Commission found in the *Local Competition Order* that:

> the ability of incumbent LECs to impose resale restrictions and conditions is likely to be evidence of market power and may reflect an attempt by incumbent LECs to preserve their market position. In a competitive market, an individual seller (an incumbent LEC) would not be able to impose significant restrictions

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[648] AT&T Reply Comments at 21. AT&T asserts that CSAs might require a higher discount rate because certain costs, such as those associated with the special billing arrangements often required by high-volume end users, are typically quite substantial.

[649] BellSouth Reply Comments at 61.

[650] *AT&T/LCI Motion to Dismiss* at 18.

[651] AT&T Comments, App., Ex. G, Affidavit of Patricia A. McFarland (AT&T McFarland Aff.) at para 35.

> and conditions on buyers because such buyers turn to other sellers. Recognizing that incumbent LECs possess market power, Congress prohibited unreasonable restrictions and conditions on resale.[652]

224. The Commission also concluded that the presumption against resale restrictions is necessary specifically for promotional or discounted offerings, such as CSAs, because otherwise incumbent LECs could "avoid the statutory resale obligation by shifting their customers to nonstandard offerings, thereby eviscerating the resale provisions of the 1996 Act."[653] The evidence in the record suggests that these concerns are realized in South Carolina. AT&T and LCI claim that BellSouth has already filed more than twice as many CSAs in 1997 (141) as it did in 1996 (66), thus insulating a substantial portion of its market from resale competition.[654] AT&T further claims that BellSouth's revenues from existing CSA contracts will amount to over $300 million over the next three to five years.[655] BellSouth thus appears to be attempting to avoid its statutory resale obligation by shifting its customers to CSAs. By foreclosing resale of CSAs, BellSouth can prevent resellers from competing for large-volume customers, thus hindering local exchange competition in South Carolina.

E. Nondiscriminatory Access to 911 and E911 Services

225. Section 271(c)(2)(B)(vii)(I) of the competitive checklist requires BellSouth to offer "nondiscriminatory access to . . . 911 and E911 services."[656] The Commission concluded in the *Ameritech Michigan Order* that "section 271 requires a BOC to provide competitors access to its 911 and E911 services in the same manner that a BOC obtains such access, *i.e.*, at parity."[657] In particular, the Commission found that a BOC "must maintain the 911 database entries for competing LECs with the same accuracy and reliability that it maintains

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[652] *Local Competition Order*, 11 FCC Rcd at 15966.

[653] *Id.* at 15970.

[654] *AT&T/LCI Motion to Dismiss* at 18. An affidavit filed with the motion to dismiss contends that, "[i]n 1996, BellSouth filed 66 CSAs with the SCPSC. For 1997, through September 26, 1997, the number of BellSouth-filed CSAs increased to at least 141, with 32 being filed in March 1997 alone." *AT&T/LCI Motion to Dismiss*, Tab C, Affidavit of Louise B. Hayne on Behalf of AT&T Corp. at para. 3. BellSouth, on the other hand, states in an affidavit that "[i]n 1997 BellSouth has reported twenty CSAs to the South Carolina PSC and has negotiated three additional CSAs that will be included in BellSouth's next report." BellSouth Varner Reply Aff. at para. 41.

[655] AT&T Comments at 43.

[656] 47 U.S.C. § 272(c)(2)(B)(vii)(I). Enhanced 911 or "E911" service enables emergency service personnel to identify the approximate location of the party calling 911.

[657] *Ameritech Michigan Order* at para. 256.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Application by BellSouth Corporation, *et al.*	)	CC Docket No. 97-231
Pursuant to Section 271 of the	)	
Communications Act of 1934, as amended,	)	
To Provide In-Region, InterLATA Services	)	
In Louisiana	)	

MEMORANDUM OPINION AND ORDER

Adopted: February 3, 1998 **Released: February 4, 1998**

By the Commission:

TABLE OF CONTENTS

customers at the pre-ordering stage, because BellSouth does not experience the same delays in processing orders that competing carriers currently experience.[208]

58. BellSouth could ameliorate this pre-ordering problem by correcting the deficiencies in its ordering systems and by providing equivalent access to OSS functions through its current systems. We therefore do not suggest that BellSouth must modify its pre-ordering systems to meet the requirement that it offer nondiscriminatory access to due dates. We only conclude, as we did in the *BellSouth South Carolina Order*, that BellSouth's pre-ordering system for providing access to due dates does not, at the present time, offer equivalent access to competing carriers.

B. Resale of Contract Service Arrangements

1. Background

59. Section 271(c)(2)(B)(xiv) of the competitive checklist requires that telecommunications services be "available for resale in accordance with the requirements of sections 251(c)(4) and 252(d)(3)."[209] In its *BellSouth South Carolina Order*, this Commission determined that BellSouth failed to comply with checklist item (xiv) by, *inter alia*, refusing to offer contract service arrangements at a wholesale discount.[210] Contract service arrangements are contractual agreements made between a carrier and a specific, typically high-volume, customer, tailored to that customer's individual needs. Contract service arrangements may include volume and term arrangements, special service arrangements, customized telecommunications service agreements, and master service agreements.[211]

60. The Commission's rules on resale restrictions state that, "[e]xcept as provided in § 51.613 of this part, an incumbent LEC shall not impose restrictions on the resale by a requesting carrier of telecommunications services offered by the incumbent LEC."[212] Section 51.613 provides in pertinent part that, "[w]ith respect to any restrictions on resale not permitted under paragraph (a), an incumbent LEC may impose a restriction only if it proves

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[208] *See supra* Section IV.A.2.a.i.

[209] 47 U.S.C. § 271(c)(2)(B)(xiv).

[210] *BellSouth South Carolina Order* at paras. 215-24. In its *Louisiana Commission Resale Order*, the Louisiana Commission established a general wholesale discount of 20.72 percent to be applied to BellSouth's retail services offered for resale. *Louisiana Commission Resale Order* at 15.

[211] *BellSouth South Carolina Order* at para. 212. According to BellSouth, "[a] contract service arrangement is simply a price negotiated with a particular customer (that is subject to competition) for telecommunications services that BellSouth makes separately available under its tariffs." BellSouth Louisiana Reply, App., Tab 13, Reply Affidavit of Alphonso J. Varner (Varner Reply Aff.) at para. 41.

[212] 47 C.F.R. § 51.605(b).

to the state commission that the restriction is reasonable and nondiscriminatory."[213] The United States Court of Appeals for the Eighth Circuit specifically upheld the Commission's findings that determinations on resale restrictions are within the Commission's jurisdiction and also upheld the Commission's resale restriction rules as a reasonable interpretation of the 1996 Act.[214]

61. As in South Carolina, BellSouth does not make contract service arrangements available at a wholesale discount in Louisiana through either its interconnection agreements or its SGAT (Statement of Generally Available Terms and Conditions).[215] For example, in its arbitrated interconnection agreement with AT&T, BellSouth states that it will not offer for resale at a wholesale discount contract service arrangements it has entered into after the effective date of the *AT&T Arbitration Order*[216] (*i.e.*, after January 28, 1997).[217] Pursuant to

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[213] *Id.* § 51.613(b). The resale restrictions permitted under subparagraph (a) do not involve contract service arrangements. Those permissible restrictions relate to cross class-selling and short-term promotions. *Id.* § 51.613(a)(1), (a)(2).

[214] *Iowa Utils. Bd. v. FCC*, 120 F.3d at 818-19. The Eighth Circuit held:

> [W]e believe that the FCC has jurisdiction to issue these particular rules and that its determinations are reasonable interpretations of the Act. . . . [S]ubsection 251(c)(4)(B) authorizes the Commission to issue regulations regarding the incumbent LECs' duty not to prohibit, or impose unreasonable limitations on, the resale of telecommunications services. . . . [47 C.F.R. § 51.613] is a valid exercise of the Commission's authority under subsection 251(c)(4)(B) because it restricts the ability of incumbent LECs to circumvent their resale obligations under the Act simply by offering their services to their subscribers at perpetual "promotional" rates.

Id. at 819.

[215] *See, e.g.*, BellSouth Louisiana Application at 66; BellSouth Louisiana Application, App. A, Vol. 5, Tab 14, Affidavit of Alphonso J. Varner (BellSouth Varner Aff.) at para. 184.

[216] BellSouth Louisiana Application, App. C-2, Vol. 21, Tab 180, *In Re: In the Matter of the Interconnection Agreement Negotiations Between AT&T Communications of the South Central States, Inc. and BellSouth Telecommunications, Inc. of the Unresolved Issues Regarding Cost-Based Rates for Unbundled Network Elements, Pursuant to the Telecommunications Act Number 47 U.S.C. 252 of 1996*, Docket U-22145, Order U-22145 at 4 (decided Jan. 15, 1997, issued Jan. 28, 1997) (*AT&T Arbitration Order*).

[217] BellSouth Louisiana Application, App. B, Vol. 9, Tab 76, Arbitrated Interconnection Agreement Between AT&T Communications of the South Central States, Inc. and BellSouth Telecommunications, Inc. (approved by the Louisiana Commission on Oct. 23, 1997) (AT&T Arbitrated Agreement) § 25.5.1. According to the AT&T Arbitrated Agreement, "BellSouth [contract service arrangements] which are in place as of January 28, 1997, shall be exempt from mandatory resale. [Contract service arrangements] entered into by BellSouth after January 28, 1997, or terminating after January 28, 1997, shall be available for resale, at no discount." *Id.* We note that the Louisiana Commission also amended its regulations to incorporate the contract service arrangement resale restriction adopted in the *AT&T Arbitration Order*. *See* BellSouth Louisiana Application, App. C-2, Vol. 22, Tab 186, *In re: Amendments to General Order dated March 15, 1996, as Amended October*

its resale agreement with ACSI, which applies to all of BellSouth's serving territory including South Carolina and Louisiana, contract service arrangements are not available for resale at any price.[218] Nor is BellSouth obligated to provide contract service arrangements at a wholesale discount pursuant to the terms of its SGAT, which provides that "BellSouth contract service arrangements entered into after January 28, 1997 are available for resale only at the same rates, terms, and conditions offered to BellSouth end users."[219] In the *Louisiana Section 271 Proceeding*, the Chief Administrative Law Judge specifically rejected AT&T's contention that BellSouth's SGAT is deficient because it exempts contract service arrangements from the wholesale pricing requirement.[220] The Louisiana Commission did not address BellSouth's refusal to offer contract service arrangements for resale at a wholesale discount when it approved BellSouth's SGAT.[221]

62. The Department of Justice notes that BellSouth's restrictions on the resale of contract service arrangements are analogous to restrictions the Commission has determined violate the Act and the Commission's regulations.[222] Likewise, new entrants generally argue that BellSouth's refusal to offer contract service arrangements for resale at the general wholesale discount violates section 251(c)(4) of the Act, the Commission's rules, and the *Local Competition Order*.[223]

2. Discussion

63. The Commission recently addressed BellSouth's refusal to offer contract service arrangements for resale at a wholesale discount in its review of BellSouth's South Carolina application and concluded that BellSouth did not satisfy the competitive checklist because it

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16, 1996. In re: Regulations for Competition in the Local Telecommunications Market, General Order at 8 (decided Mar. 19, 1997, issued April 1, 1997).

[218] BellSouth Louisiana Application, App. B, Vol. 3, Tab 13, Resale Agreement Between American Communication Services, Inc. and BellSouth Telecommunications, Inc. (approved by the Louisiana Commission on April 8, 1997) (ACSI Resale Agreement) § III.A.

[219] BellSouth SGAT § XIV.B.1.

[220] *ALJ 271 Recommendation* at 43. The Chief Administrative Law Judge concluded that BellSouth's SGAT provisions relating to the resale of contract service arrangements are consistent with the Louisiana Commission's conclusions in the *AT&T Arbitration Order*. *Id.*

[221] *See Louisiana Commission 271 Compliance Order*; *see also* Louisiana Commission Comments at 19.

[222] DOJ Louisiana Evaluation at 30, n.60.

[223] *See. e.g.*, AT&T Comments at 59; MCI Comments at 60-61; Sprint Comments at 37-39; TRA Comments at 22-23.

did not offer contract service arrangements at a wholesale rate.[224] In this Order, we reaffirm our reasoning in the *BellSouth South Carolina Order* and again conclude that BellSouth does not comply with item (xiv) of the competitive checklist because it refuses to offer at a wholesale discount contract service arrangements entered into after January 28, 1997 in Louisiana.[225]

a. No General Exemption for Contract Service Arrangements

64. We conclude, based on facts nearly identical to those presented in the *BellSouth South Carolina Order*,[226] that BellSouth has created, through its interconnection agreements and its SGAT in Louisiana, a general exemption from the requirement that incumbent LECs offer their promotional or discounted offerings, including contract service arrangements, at a wholesale discount. In the *Local Competition Order*, the Commission concluded that resale restrictions are presumptively unreasonable and that an incumbent LEC can rebut this presumption, but only if the restrictions are "narrowly tailored."[227] Moreover, the Commission specifically concluded that the Act does not permit a general exemption from the requirement that promotional or discounted offerings, including contract service arrangements, be made available at a wholesale discount.[228] As we stated in the *BellSouth South Carolina Order*, neither the Act nor the Commission's resale rules contemplate that a state commission can generally exempt all contract service arrangements from the Act's requirement that retail offerings be available for resale at a discount from the retail price.[229] For the reasons discussed below, we find that BellSouth's refusal to offer contract service arrangements at a

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[224] *BellSouth South Carolina Order* at paras. 215-24.

[225] Because we conclude that BellSouth's refusal to offer for resale at a wholesale discount contract service arrangements entered into after January 28, 1997 renders its application deficient, we do not reach the issue of BellSouth's refusal to offer for resale at any price contract service arrangements entered into on or before January 28, 1997..

[226] *See BellSouth South Carolina Order* at paras. 217-18.

[227] *Local Competition Order*, 11 FCC Rcd at 15966.

[228] *Id.* at 15970. The Commission made clear in the *Local Competition Order* that section 251(c)(4) "makes no exception for promotional or discounted offerings, including contract and other customer-specific offerings" and that, therefore, "no basis exists for creating a general exemption from the wholesale requirement for all promotional or discount service offerings made by incumbent LECs." *Id.* The United States Court of Appeals for the Eighth Circuit held that determinations on resale restrictions are within the Commission's jurisdiction, and that our resale restriction rules are a reasonable interpretation of the terms of the 1996 Act. *Iowa Utils. Bd. v. FCC*, 120 F.3d at 818-19.

[229] *BellSouth South Carolina Order* at paras. 217-18.

wholesale discount is not narrowly tailored and therefore constitutes an impermissible general exemption of contract service arrangements from the wholesale discount requirement.[230]

65. We are unpersuaded by BellSouth's related claims that (1) the wholesale discount should not be applied to contract service arrangements because contract service arrangements are offerings that BellSouth has already discounted in order to compete for a particular end user customer,[231] and (2) its refusal to offer contract service arrangements at a wholesale discount does not restrict new entrants' ability to resell such services because new entrants may purchase each of the tariffed services that make up the contract service arrangement separately at the wholesale rate.[232] In the *Local Competition Order*, the Commission specifically considered and rejected incumbent LECs' claims that the wholesale rate obligation should not apply to high volume rate offerings because they are already discounted.[233] The Commission instead concluded that any service sold to end users is a retail service, and thus is subject to the wholesale discount requirement, even if it is already priced at a discount off the price of another retail service.[234] Because contract service arrangements are discounted retail service offerings that are not exempt from the statutory resale requirement in section 251(c)(4), we reiterate that BellSouth must offer contract service arrangements for resale at a wholesale discount to new entrants.

66. As in our *BellSouth South Carolina Order*,[235] we also reject BellSouth's contention that application of the wholesale discount to contract service arrangements would greatly overstate the costs avoided by BellSouth because BellSouth does not bear ordinary marketing costs for contract service arrangements, which are individually negotiated arrangements.[236] Neither BellSouth nor the Louisiana Commission has offered any evidence that the general wholesale discount rate would overstate the avoided costs of contract service

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[230] BellSouth does not dispute that, pursuant to the terms of its ACSI Resale Agreement, AT&T Arbitrated Agreement, and its SGAT, it refuses to resell contract service arrangements at a discount. *See* ACSI Resale Agreement § III.A; AT&T Arbitrated Agreement § 25.5.1; and SGAT § XIV.B.1.

[231] BellSouth Louisiana Application at 66-67. According to the Louisiana Commission, "[r]equiring BellSouth to offer already discounted contract service arrangements for resale at wholesale prices would create an unfair advantage for AT&T." *AT&T Arbitration Order* at 4.

[232] BellSouth Louisiana Reply at 67.

[233] *Local Competition Order*, 11 FCC Rcd at 15971; *see also BellSouth South Carolina Order* at para. 217.

[234] *Local Competition Order*, 11 FCC Rcd at 15971 ("If a service is sold to end users, it is a retail service, even if it is already priced as a volume-based discount off the price of another retail service").

[235] *BellSouth South Carolina Order* at para. 220.

[236] *See* BellSouth Varner Reply Aff. at para. 41; BellSouth Louisiana Reply at 68-69.

arrangements, as BellSouth contends.[237] Moreover, as we stated in the *BellSouth South Carolina Order*, the state commission need not apply the general wholesale discount rate, in this case 20.72 percent, to the resale of contract service arrangements, and may instead apply a single discount rate based on the costs avoidable by offering contract service arrangements at wholesale.[238] Because similar marketing, billing, and other costs would be avoided for all contract service arrangements, it would be feasible, and sufficiently accurate, to calculate a single wholesale discount rate to be applied to all contract service arrangements.[239] Such a wholesale discount for contract service arrangements encourages efficient competition because a reseller may compete with an incumbent LEC and facilities-based competitive LECs only to the extent that the reseller can perform marketing and billing services more efficiently and therefore at lower cost.[240]

67. We are not persuaded by BellSouth's assertion that, if it is required to offer contract service arrangements to resellers at a wholesale discount, it will lose business customers and their contribution to BellSouth's total cost recovery, thus disrupting the balance between residential and business rates and affecting BellSouth's ability to meet the goal of "maximizing access by low-income consumers to telecommunications services."[241] We specifically rejected BellSouth's identical claims that it would lose profit as a result of wholesale-priced, resale-based competition in the *BellSouth South Carolina Order*.[242] In that Order, we concluded that claims of lost contributions to high-cost subsidies do not justify an exception from either the resale requirements or the requirement to offer unbundled network elements of sections 251 and 271.[243] We further determine that, because the wholesale discount is limited to avoidable costs, BellSouth should lose no more contribution from resold contract service arrangements made available to resellers at an appropriate wholesale discount than it would lose from the resale of tariffed offerings at the general wholesale discount.

68. We also take this opportunity to reiterate the important policy concerns that make restrictions on resale undesirable. In the *BellSouth South Carolina Order*, we expressed

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[237] AT&T contends that, in fact, the opposite might be true: contract service arrangements might require a higher wholesale discount rate because certain costs, such as those associated with the special billing arrangements often required by high-volume end users, are typically quite substantial. AT&T Comments at 62, n.36.

[238] *BellSouth South Carolina Order* at para. 220.

[239] *Id.*

[240] *Contra* BellSouth Louisiana Reply at 69.

[241] BellSouth Louisiana Application at 68 (*citing Local Competition Order*, 11 FCC Rcd at 15975).

[242] *BellSouth South Carolina Order* at para. 221.

[243] *Id.*

concern that BellSouth's failure to offer contract service arrangements for resale at a discount in South Carolina impedes competition for its large-volume customers and thus impairs the use of resale as a vehicle for competitors to enter BellSouth's market.[244] As the Commission recognized in the *Local Competition Order*, "the ability of incumbent LECs to impose resale restrictions and conditions is likely to be evidence of market power and may reflect an attempt by incumbent LECs to preserve their market position."[245] We are therefore concerned that BellSouth's refusal to offer contract service arrangements at a wholesale discount in Louisiana may impede one of the three methods Congress developed for entry into the BOCs' monopoly market.

69. We remain concerned that, as discussed in the *BellSouth South Carolina Order*, BellSouth might seek to convert customers to contract service arrangements in order to "evade" the Louisiana Commission's wholesale discount.[246] In the *Local Competition Order*, the Commission concluded that the presumption against resale restrictions is necessary specifically for promotional or discounted offerings, such as contract service arrangements, in order to prevent incumbent LECs from "avoid[ing] the statutory resale obligation by shifting their customers to nonstandard offerings, thereby eviscerating the resale provisions of the 1996 Act."[247] We concluded in the *BellSouth South Carolina Order* that BellSouth "appears to be attempting to avoid its statutory resale obligation in South Carolina by shifting its customers to contract service arrangements."[248] AT&T contends that, unlike in South Carolina, it is "impossible" to determine whether BellSouth is attempting to evade the resale requirement in Louisiana because BellSouth is not required to disclose contract service arrangements that it has entered into with customers in Louisiana unless the customer "requests and/or consents to the disclosure."[249] AT&T contends, however, that, in other states

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[244] *Id.* at paras. 223-24.

[245] *Local Competition Order*, 11 FCC Rcd at 15966.

[246] *BellSouth South Carolina Order* at 224.

[247] *Local Competition Order*, 11 FCC Rcd at 15970.

[248] *BellSouth South Carolina Order* at para. 224.

[249] BellSouth Louisiana Application, App. C-2, Vol. 23, Tab 191, *In Re: In the Matter of the Interconnection Agreement Negotiations Between AT&T Communications of the South Central States, Inc. and BellSouth Telecommunications, Inc., of the Unresolved Issues Regarding Cost-Based Rates for Unbundled Network Elements, Pursuant to the Telecommunications Act Number 47 U.S.C. 252 of 1996*, Docket U-22145, Order U-22145-A at 3-4 (decided on June 10, 1997, issued June 12, 1997) (*Second AT&T Arbitration Order*). The Louisiana Commission reasoned that, "[r]equiring BellSouth to produce copies of each and every contract service arrangement it has entered into would constitute the release of 'non-public customer information regarding a customer's account or calling record' for a specified class, which is prohibited by this Commission's General Order dated March 15, 1996, entitled *Louisiana Public Service Commission Regulations for the Local Telecommunications Market*, § 1201(B)(11)." *Id.* at 4. We do not consider whether such a nondisclosure requirement complies with the requirements of the competitive checklist. *See* 47 U.S.C. § 271(c)(2)(B)(xiv).

in which contract service arrangements are publicly disclosed, BellSouth has increased its reliance on contract service arrangements.[250] Although we make no specific finding that, in Louisiana, BellSouth is attempting to avoid its statutory resale obligation by shifting its customers to contract service arrangements, we remain concerned that, because many of BellSouth's contract service arrangements apply throughout BellSouth's service territory, BellSouth may impede the development of competition in Louisiana by preventing resellers from competing for large-volume users.

b. State Jurisdiction

70. We further conclude that BellSouth's refusal to offer contract service arrangements at a wholesale discount is not a local pricing matter within the exclusive jurisdiction of the state commission.[251] We rejected this contention in the *BellSouth South Carolina Order*, noting that the United States Court of Appeals for the Eighth Circuit upheld the Commission's conclusions in the *Local Competition Order* regarding the scope of the resale requirement as it applies to promotions and discounts, including contract service arrangements.[252] In upholding the Commission's determination, the court stated that the Commission's rules requiring the resale of promotions and discounts concern the "overall scope of the incumbent LECs' resale obligation" rather than "the specific methodology for state commissions to use in determining the actual wholesale rates."[253] Moreover, as we stated in the *BellSouth South Carolina Order*, allowing incumbent LECs to set the wholesale discount for services subject to the resale requirement at a discount of zero would wholly invalidate such a wholesale pricing obligation. We note that the Louisiana Commission appears to have treated the resale restriction as a matter separate from its establishment of the general wholesale discount and did not conduct an analysis to determine that the appropriate

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[250] AT&T Comments, App. Vol. VI, Tab I, Affidavit of Patricia A. McFarland (AT&T McFarland Aff.) at 17. For example, AT&T claims that BellSouth has already filed more than twice as many contract service arrangements in 1997 as it did in 1996, thus insulating a substantial portion of its market from resale competition. According to AT&T, "[i]n 1994 and 1995, prior to the advent of the Act, BellSouth filed with the South Carolina [Commission] only 47 and 41 contract service arrangements respectively. In 1996, with the advent of the Act, BellSouth filed 66 contract service arrangements in South Carolina. And as of September 30, 1997, BellSouth has filed 141 contract service arrangements in South Carolina, more than twice as many as it did in all of 1996." *Id.* AT&T further claims that BellSouth's revenues from existing contract service arrangement contracts will amount to over $300 million over the next three to five years. *Id.* at 17-18.

[251] *See* AT&T Comments at 61; Sprint Comments at 38; *but see* BellSouth Louisiana Application at 67; BellSouth Louisiana Reply at 68.

[252] *Iowa Utils. Bd. v. FCC*, 120 F.3d at 819; *see also* AT&T Comments at 61; Sprint Comments at 38.

[253] *Iowa Utils. Bd. v. FCC*, 120 F.3d at 819.

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Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
Application of BellSouth Corporation, BellSouth Telecommunications, Inc., and BellSouth Long Distance, Inc., for Provision of In-Region, InterLATA Services in Louisiana	)	CC Docket No. 98-121

MEMORANDUM OPINION AND ORDER

Adopted: October 13, 1998 **Released: October 13, 1998**

By the Commission: Chairman Kennard and Commissioners Powell and Tristani issuing separate statements; Commissioner Ness concurring in part and issuing a statement; and Commissioner Furchtgott-Roth concurring and issuing a statement.

TABLE OF CONTENTS

satisfies the requirements of checklist item (xiv). BellSouth makes a *prima facie* showing that it (1) offers for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers and (2) offers such telecommunications services for resale without unreasonable or discriminatory conditions or limitations. BellSouth, however, fails to make a *prima facie* showing that it provides nondiscriminatory access to operations support systems for the resale of its retail telecommunications services.

310. Availability of wholesale rates. BellSouth provides sufficient evidence to demonstrate that it has a concrete legal obligation to make available telecommunications services at wholesale rates, as required by the statute. Section XIV of BellSouth's SGAT provides that "telecommunications services that BellSouth provides at retail to subscribers that are not telecommunications carriers"[977] are available at discount levels ordered by the Louisiana Commission.[978] BellSouth's interconnection agreements have similar provisions.[979]

311. Since the issuance of the *First BellSouth Louisiana Order*, BellSouth has amended its SGAT to state that wholesale discounts apply to CSAs.[980] The currently applicable wholesale discount for CSAs is 20.72 percent, but may change at "such time as a CSA-specific wholesale discount is determined."[981] BellSouth states that it will agree to contract language similar to the SGAT CSA resale language with interested CLECs.[982] Moreover, we note that BellSouth permits competing carriers to substitute the resale terms and

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[977] SGAT § XIV.A. The sole exceptions to this are retail promotions offered for 90 days or less, an exception permitted under this Commission's rules. SGAT § XIV.B.1. *See* 47 C.F.R. § 51.613(a)(2). We note, however, that Section 51.613(a)(2)(ii) provides that exempted short-term promotions may not involve "rates that will be in effect" for more than 90 days. 47 C.F.R. § 51.613(a)(2)(i). We also note that such short-term promotions are not to be used to evade the wholesale rate obligation, such as through sequential 90-day offerings. 47 C.F.R. § 51.613(a)(2)(ii). Such offerings are subject to resale at their short-term promotional rate pursuant to section 251(b)(1) of the Act. 47 U.S.C. § 251(b)(1); *Local Competition First Report and Order* 11 FCC Rcd at 15970 n.2250; SGAT § XIV.B.1.

[978] Currently, the wholesale discount applicable to CSAs is 20.72 percent, which is taken off the tariffed intrastate rate. SGAT § XIV.B., Att. H.

[979] *See, e.g.*, AT&T Agreement § 23.1; MCI Agreement at Att. 2, § 1.1.

[980] SGAT § XIV.B.

[981] SGAT Att. H.

[982] BellSouth Application at 62.

conditions contained in the SGAT for that carrier's interconnection agreement.[983]

312. Furthermore, we are not persuaded by KMC's claims that BellSouth should not be considered in compliance with checklist item (xiv) unless it allows parties to amend their agreements to include the CSA wholesale discount provision without accepting an entirely new resale agreement.[984] We note that Section 24.0 of KMC's agreement requires it to elect an entire resale provision of another agreement if it seeks to amend its preexisting agreement.[985] Moreover, KMC is entitled to select the entire resale provision from BellSouth's SGAT, which, as discussed above, we have found to meet the requirements of checklist item (xiii). We observe, however, that our conclusions regarding KMC's rights under its agreement might be affected by the pending Supreme Court review of *Iowa Utilities Board*.[986]

313. Likewise, we disagree with MCI's claim that BellSouth's application is "premature" until the Louisiana Commission determines the wholesale discount applicable to CSAs consistent with section 252(d)(3) because, according to MCI, until such time, competitors are unable to make business plans based on an uncertain level of wholesale discount.[987] As discussed above, BellSouth's SGAT legally commits it to provide CSAs at some state-determined wholesale discount, in conformance with section 251(c)(4) and the *First BellSouth Louisiana Order*. We are not persuaded at this time that the possibility that a state might change the level of the wholesale discount for certain offerings necessitates a finding that BellSouth fails to comply with 271(c)(2)(B)(xiv) of the Act.

314. Finally, we are not persuaded by TRA's argument that, because voice mail and other voice messaging services are "telecommunications services," BellSouth's refusal to offer these services for resale at wholesale rates constitutes a failure to meet checklist item (xiv).[988] Checklist item (xiv) requires "telecommunications services," as defined by the 1996 Act, to be

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[983] BellSouth Varner Aff. at paras. 19-20.

[984] KMC Reply at 5-6.

[985] KMC Agreement § 24.0.

[986] Among the issues on which the Supreme Court granted *certiorari* was the Eighth Circuit's decision to vacate 47 C.F.R. § 51.809, which allowed requesting carriers to "pick and choose" among individual provisions of other interconnection agreements that have previously been negotiated between an incumbent LEC and other requesting carriers without being required to accept the terms and conditions of the agreements in their entirety. *See Iowa Utils. Bd.*, FCC Petition for *Certiorari* at 10.

[987] MCI Comments at 76.

[988] TRA Comments at 29.

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FCC 96-325

Before the
Federal Communications Commission
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
	)	
Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers	)	CC Docket No. 95-185
	)	
	)	

FIRST REPORT AND ORDER

Adopted: August 1, 1996 Released: August 8, 1996

By the Commission: Chairman Hundt and Commissioners Quello, Ness, and Chong issuing separate statements.

Table of Contents

by consecutively offering a series of 90-day promotions.

951. We find unconvincing the arguments that the offerings under section 251(c)(4) should not apply to volume-based discounts. The 1996 Act on its face does not exclude such offerings from the wholesale obligation. If a service is sold to end users, it is a retail service, even if it is priced as a volume-based discount off the price of another retail service. The avoidable costs for a service with volume-based discounts, however, may be different than without volume contracts.

952. We are concerned that conditions that attach to promotions and discounts could be used to avoid the resale obligation to the detriment of competition. Allowing certain incumbent LEC end user restrictions to be made automatically binding on reseller end users could further exacerbate the potential anticompetitive effects. We recognize, however, that there may be reasonable restrictions on promotions and discounts. We conclude that the substance and specificity of rules concerning which discount and promotion restrictions may be applied to resellers in marketing their services to end users is a decision best left to state commissions, which are more familiar with the particular business practices of their incumbent LECs and local market conditions. These rules are to be developed, as necessary, for use in the arbitration process under section 252.

953. With respect to volume discount offerings, however, we conclude that it is presumptively unreasonable for incumbent LECs to require individual reseller end users to comply with incumbent LEC high-volume discount minimum usage requirements, so long as the reseller, in aggregate, under the relevant tariff, meets the minimal level of demand. The Commission traditionally has not permitted such restrictions on the resale of volume discount offers.[2251] We believe restrictions on resale of volume discounts will frequently produce anticompetitive results without sufficient justification. We, therefore, conclude that such restrictions should be considered presumptively unreasonable. We note, however, that in calculating the proper wholesale rate, incumbent LECs may prove that their avoided costs differ when selling in large volumes.

3. Below-Cost and Residential Service

a. Background and Comments

954. Responding to our general questions regarding the scope of limitations that may be

[2251] *See, e.g., Regulatory Policies Concerning Resale and Shared Use of Common Carrier Services and Facilities*, Docket No. 20097, Report and Order, 60 FCC 2d 261, 308-16 (1976) (divisions of full time private line circuits will enable smaller users to make efficient, discrete use of private line offerings, and such advantages will be in terms of cost savings and selectivity rather than technical advantages).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Application of BellSouth Corporation, *et al.*	)	CC Docket No. 97-208
Pursuant to Section 271 of the	)	
Communications Act of 1934, as amended,	)	
To Provide In-Region, InterLATA Services	)	
In South Carolina	)	
	)	
	)	

MEMORANDUM OPINION AND ORDER

Adopted: December 24, 1997 **Released: December 24, 1997**

By the Commission: Chairman Kennard and Commissioners Ness, Furchtgott-Roth, and Powell issuing separate statements.

TABLE OF CONTENTS

intrastate jurisdiction.[641] This contention is erroneous. The Commission's conclusions in the *Local Competition Order* regarding the scope of the resale requirement as it applies to promotions and discounts, including CSAs, was upheld by the Eighth Circuit.[642] In upholding the Commission's determination, the court stated that the Commission's rules requiring the resale of promotions and discounts concern the "overall scope of the incumbent LECs' resale obligation" rather than "the specific methodology for state commissions to use in determining the actual wholesale rates."[643] Additionally, in establishing BellSouth's exemption from offering CSAs to resellers at wholesale rates, the South Carolina Commission analyzed the matter as a resale restriction rather than as a pricing issue.[644] BellSouth's own arguments concerning the resale of CSAs similarly analyze the issue as a resale restriction.[645] Allowing incumbent LECs to set the wholesale discount for services that must be resold at a discount of zero would wholly invalidate such a wholesale pricing obligation. Moreover, there is no evidence in the record that the South Carolina Commission conducted an analysis to determine that the appropriate discount for CSAs should be zero.

220. The South Carolina Commission also contends that its policy with respect to pricing for CSAs is the only reasonable way to implement the Act's resale provisions. The South Carolina Commission states that BellSouth does not bear ordinary marketing costs for CSAs because they are individually negotiated arrangements, and that therefore the 14.8 percent resale discount applicable to BellSouth's generally available retail offerings would greatly overstate the costs avoided by BellSouth. Moreover, the South Carolina Commission contends that it would be impossible to determine on a case-by-case basis what discount is necessary to account for BellSouth's potential cost savings with respect to a particular CSA.[646] We do not believe, however, that such a process would be necessary. Because similar marketing, billing, and other costs would be avoided for all CSAs, we believe that it would be feasible, and sufficiently accurate, to calculate a single discount rate that would apply to all CSAs.[647] A single discount rate based on the costs avoidable through offering CSAs at wholesale could be applied easily and would ensure that BellSouth was made no worse off by the resale of its services. AT&T states that neither BellSouth nor the South Carolina Commission has provided any analysis to show that the 14.8 percent discount rate would

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[641] BellSouth Reply Comments at 60; South Carolina Commission Comments at 11.

[642] *Iowa Utils. Bd.*, 120 F.3d at 819.

[643] *Id.*

[644] *See AT&T Arbitration Order* at 4-5 ("The Act indeed permits reasonable and non-discriminatory conditions or limitations on the resale of telecommunications services, and we therefore condition our ruling with respect to CSAs.").

[645] *See* BellSouth Reply Comments at 60.

[646] South Carolina Commission Comments at 10.

[647] In the *Local Competition Order*, the Commission concluded that the discount rate could vary by service. *Local Competition Order*, 11 FCC Rcd at 15957-58.

overstate the avoided costs of CSAs, and in fact no such analysis appears in the record presented to us.[648]

221. BellSouth also argues in reply that, if it were to be required to offer CSAs to resellers at a wholesale discount, it would lose customers and their contribution to total cost recovery. This, according to BellSouth, would affect its ability to meet the goal of "maximizing access by low-income consumers to telecommunications services."[649] We find unpersuasive BellSouth's claims regarding contribution loss resulting from wholesale-priced resale-based competition. Claims of lost contributions to high-cost subsidies do not justify an exception from either the resale requirements or the requirement to offer unbundled network elements of sections 251 and 271.

222. AT&T and LCI have also raised the issue of cancellation penalties that may apply when a new entrant seeks to resell the CSA contract.[650] They contend that such penalties have the effect of "insulat[ing] substantial portions of the market from resale competition."[651] There is insufficient evidence in the record concerning the exact nature of the cancellation or transfer penalties BellSouth is charging, or seeks to include in its CSAs during negotiations with potential customers, for us to conclude at this time that such fees create an unreasonable condition or limitation on resale of the service. We are sensitive that CSAs represent agreements that provide both the LEC and the CSA customer with various benefits. Because, depending on the nature of these fees, their imposition creates additional costs for a CSA customer that seeks service from a reseller, they may have the effect of insulating portions of the market from competition through resale. We, therefore, would want to review such fees and request that BOCs provide information justifying the level of cancellation or transfer fees in future applications.

223. We conclude by reemphasizing the important policy concerns that make restrictions on resale undesirable. BellSouth's CSA restriction may have significant competitive effects. Resale is one of the three mechanisms Congress developed for entry into the BOCs' monopoly market. BellSouth's restriction on CSAs may have the effect of impeding this entry vehicle. The Commission found in the *Local Competition Order* that:

> the ability of incumbent LECs to impose resale restrictions and conditions is likely to be evidence of market power and may reflect an attempt by incumbent LECs to preserve their market position. In a competitive market, an individual seller (an incumbent LEC) would not be able to impose significant restrictions

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[648] AT&T Reply Comments at 21. AT&T asserts that CSAs might require a higher discount rate because certain costs, such as those associated with the special billing arrangements often required by high-volume end users, are typically quite substantial.

[649] BellSouth Reply Comments at 61.

[650] *AT&T/LCI Motion to Dismiss* at 18.

[651] AT&T Comments, App., Ex. G, Affidavit of Patricia A. McFarland (AT&T McFarland Aff.) at para 35.